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No. 93-577

In The

Supreme Court of the United States

October Term, 1993

ROBERT J. MAXWELL,

Petitioner,

vs.

THE FIRST NATIONAL BANK OF MARYLAND, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS THE FIRST NATIONAL BANK OF MARYLAND AND ASSOCIATED TRADERS CORPORATION

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QUESTIONS PRESENTED

The United States intervened in this case and asserted the state secrets privilege to preclude the disclosure in the proceeding of any information that would tend either to confirm or to deny an alleged relationship between the Central Intelligence Agency ("CIA") and either respondent The First National Bank of Maryland or respondent Associated Traders Corporation. The question presented in the Petition is whether the United States' assertion of the privilege should not have been recognized because (a) the information protected was not covered by a secrecy agreement between the CIA and the petitioner and (b) the government has not acted to bar the petitioner from making extrajudicial statements about the alleged relationships. A subsidiary question apparently raised in the petitioner's argument in support of his Petition is whether this case could be tried without the presentation of evidence tending to confirm or deny the alleged connections between the CIA and the respondents.

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RESPONDENTS' BRIEF IN OPPOSITION

This brief is filed on behalf of the respondents The First National Bank of Maryland ("FNB" or the "Bank")[1] and Associated Traders Corporation ("ATC"), as well as the former directors of ATC.

STATEMENT OF THE CASE

According to the Amended Complaint, petitioner Robert J. Maxwell was employed by the Bank to work in its International

1. FNB is a subsidiary of First Maryland Bancorp and Allied Irish Bank, P.L.C. FNB has no non-wholly-owned subsidiaries.

Division from October, 1983 to August, 1985. It is alleged that, during petitioner's first week on the job, his then supervisor, Ronald Teather, asked him to work on ATC's accounts, and that Mr. Teather informed petitioner that ATC was actually the Central Intelligence Agency ("CIA"). First Amended Complaint ¶ 11. The petitioner allegedly agreed to do the work and was given a form to complete for the purpose of obtaining "CIA approval to do work for the Associated Traders' account." *Id.*

The Amended Complaint describes three transactions involving transfers of funds from ATC accounts that the petitioner handled during his employment with FNB: one in December, 1983, a second in January, 1985, and a third in February, 1985. *Id.* ¶¶ 13, 20-21, 28. At about the time of the last transaction, petitioner allegedly became concerned about ATC's activities and demanded written assurance from his superiors at FNB regarding his authorization to carry out the ATC funds transfers; he also requested that his name be removed from the ATC account records with FNB. *Id.* ¶¶ 26-32. It is alleged that a number of conversations ensued, during one of which petitioner's superiors assured him that he "should not fear that the CIA would be displeased with his actions" and that he "and his family were not in any 'danger' "; petitioner allegedly perceived these statements to be "veiled threats". *Id.* ¶ 39. On March 25, 1985, petitioner was given a memorandum signed by an FNB Executive Vice President that stated "[t]o the knowledge of the Bank, from the time of your employment, to date, you have been conducting business in an authorized manner and in compliance with instructions"; this document failed to satisfy petitioner because it did not explicitly mention ATC. Ex. No. 3 to Complaint filed in Circuit Court for Baltimore City (Aug. 11, 1988); First Amended Complaint ¶ 49.

It is generally alleged that between February and August, 1985, petitioner was "harassed" by his superiors and his "working conditions grew increasingly intolerable", all because of the

concerns that he had raised regarding the legality of the ATC transactions. *Id.* ¶¶ 54-58. In April, 1985, petitioner "received a less than average raise" and a performance evaluation that was "only [at] the satisfactory level." *Id.* ¶ 51. As a result of his "increasing stress", petitioner felt "compelled" to resign from the Bank on August 12, 1985. *Id.* ¶ 58. Although he went to work for a rival bank in Baltimore a few days later, petitioner did not leave his worries about ATC behind him; in early September, 1985, he wrote to FNB's President, again demanding "written authorization" for his work on the ATC transactions. *Id.* ¶ 60. In mid-September, 1985, an FNB executive allegedly called petitioner and informed him that representatives of ATC and the CIA wished to meet with him, but he declined to do that. *Id.* ¶ 61. Finally, about two weeks later, petitioner allegedly suffered a "nervous breakdown"; he has allegedly not been able to work in banking since. *Id.* ¶¶ 62-63.

On August 11, 1988, petitioner filed a suit against the Bank in the Circuit Court for Baltimore City seeking compensatory and punitive damages for the use of his name without authorization, wrongful discharge, breach of employment contract, and both intentional and negligent infliction of emotional distress. On the petition of FNB, the case was removed to the United States District Court for the District of Maryland in September, 1988.

On June 11, 1990, petitioner was granted leave to file an Amended Complaint in which he brought in as additional defendants ATC (characterized as "a/k/a the Central Intelligence Agency"), the three former directors of ATC (which had been dissolved in 1988), and John Does One through Ten, described as "Unknown Officials" of the CIA, the Federal Bureau of Investigation ("FBI") and the Department of Justice ("DOJ"). *Id.* ¶ 1. The First Amended Complaint dropped the claim based on negligent infliction of emotional distress, and added two new counts: a claim that the Bank had conspired with unknown officials of the CIA, the FBI and DOJ to interfere with petitioner's civil

rights, in violation of 42 U.S.C. § 1985(2), and a *Bivens* claim alleging violation of petitioner's "First Amendment right to speak out on issues of significant public concern . . ." *Id.* ¶¶ 69-79. The new claims were based principally upon a telephone conversation that occurred in January, 1989, in which counsel for FNB, purportedly acting "on behalf of" or "as part of a conspiracy with" the CIA, the FBI, and DOJ, allegedly informed petitioner's former lawyer, Thomas J. Dolina (who was replaced by petitioner in October, 1989) that he should "go easy" in the matter and "that if this advice were not followed, Mr. Dolina would be disbarred and Mr. Maxwell would be criminally prosecuted". *Id.* ¶¶ 65-66.

Acting on a Motion to Compel filed by petitioner, the district court on July 19, 1990, entered an order directing Mr. Teather to respond to "various questions regarding the status of the CIA as a bank customer and the nature of various shipments by ATC" and directing FNB to provide copies of "wire fund transfers, documents, or other memoranda which have some reference to Associated Traders Corporation". Memorandum accompanying Order granting Motion to Compel (July 19, 1990). In December, 1990, the United States filed a Suggestion of Interest and moved for a protective order "precluding all discovery or the disclosure of any information during any proceedings in this matter that would tend to either confirm or deny any alleged connection between the Central Intelligence Agency and either defendant First National Bank of Maryland or defendant Associated Traders Corp." Suggestion of Interest by the United States of America and Motion for a Protective Order (December 26, 1990). The motion was accompanied by a Declaration and Formal Claim of State Secrets Privilege executed by William H. Webster, who was then Director of Central Intelligence. Mr. Webster asserted the state secrets privilege in order to preserve the government's option of neither confirming nor denying any relationship with either ATC or the Bank. Mr. Webster averred that "a confirmation or denial of information concerning an alleged covert CIA contact or

relationship would damage the national security for several reasons", which he went on to describe in general terms. Declaration and Formal Claim of State Secrets Privilege by William H. Webster (December 21, 1990) ¶ 9. Mr. Webster also submitted an *ex parte, in camera* declaration explaining his reasons in greater detail.

On May 7, 1991, the court referred all discovery matters to Magistrate Judge Catherine C. Blake for resolution. On October 9, 1991, Magistrate Judge Blake issued a Report and Recommendation in which she found, based on the declarations that the government had submitted with its motion and additional material that had been provided *in camera* at her request, that "the United States has shown a reasonable danger that disclosure of information concerning the existence of a relationship between the CIA and ATC or FNB would harm national interests, including intelligence-gathering methods and capabilities, and relations with foreign governments", and accordingly recommended that the United States' Motion for a Protective Order be granted. (App. 32a).[2] After a *de novo* review of the entire matter, District Judge William M. Nickerson entered an Order affirming and adopting the Magistrate's Report and Recommendation on April 29, 1992. (App. 14a-15a).

Following the entry of the protective order, FNB and ATC filed motions for dismissal or, in the alternative, for summary judgment, on the ground that petitioner would be unable to prove any of his claims without violating the terms of the protective order. In a Memorandum filed on September 30, 1992, Judge Nickerson reviewed the petitioner's claims seriatim and determined that none of them could be proved without evidence

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2. Appendix citations are to the appendix to the Petition for a Writ of Certiorari.

made unavailable by the protective order. (App. 5a-12a). Accordingly, the motions for summary judgment were granted and judgment was entered in favor of the respondents. (App. 13a).

The petitioner appealed to the United States Court of Appeals for the Fourth Circuit, which affirmed the District Court's judgment in an unreported, *per curiam* opinion rendered on July 14, 1993. (App. 1a-4a).

REASONS FOR DENYING THE WRIT

I.

SUMMARY OF ARGUMENT

The respondents oppose the grant of certiorari. The petitioner has not satisfied any of the certiorari considerations set forth in Rule 10. The Fourth Circuit's decision is not in conflict with the decision of any other federal court of appeals, nor has the Fourth Circuit decided an important question of constitutional law that has not been, but should be, addressed by this Court, or in any "way that conflicts with applicable decisions of this Court."

The petitioner incorrectly characterizes the district court's decision as an "unprecedented expansion of the state secrets privilege" (Petition at 12-13). On the contrary, as the United States demonstrates in its Brief, the rulings of the district court on the government's motion for protective order and the respondents' motions for summary judgment were based upon, and compelled by, well-established principles regarding the recognition and application of the privilege. The propriety of the district court's granting the protective order, and the scope of that order, are discussed in the government's Brief and need not be further addressed here.

The petitioner asserts that "as a matter of law, whether the CIA was, in fact, involved is irrelevant to Mr. Maxwell's claims and the possible defenses in this case" (Petition at 21), thus raising the question whether those claims could hav been tried without disclosing the information (and endangering the national interests) guarded by the protective order. Because the Court might find this question to be "fairly included" in the Question Presented in the Petition, this Memorandum briefly analyzes the claims set forth in the Amended Complaint to show that any trial of those claims would necessarily threaten the disclosure of information that would tend to establish the existence *vel non* of the alleged CIA-ATC-FNB connection.

II.

THE DISTRICT COURT PROPERLY FOUND THAT THIS CASE COULD NOT BE TRIED WITHOUT ENDANGERING PROTECTED STATE SECRETS.

Count 1. Petitioner must prove the existence of a conspiracy to interfere with his civil rights, in violation of 42 U.S.C. § 1985(2), to establish this claim. The claim is based upon a single alleged incident: a telephone call made to petitioner's former lawyer by a lawyer for FNB, who was allegedly "acting on behalf of the CIA, the FBI, and Department of Justice officials, or a part of a conspiracy with officials of the CIA, the FBI and the Department of Justice . . . ." First Amended Complaint ¶ 65. It would be impossible to try this count without presenting evidence that would tend to establish a relationship between the CIA, ATC, and FNB, in violation of the protective order.

Count 2. This count is a *Bivens* claim for violation of rights protected by the First Amendment based upon alleged "threats of defendants Bank, Associated Traders Corporation a/k/a the Central Intelligence Agency, and John Does One through Ten . . . ." First

Amended Complaint ¶ 75. A showing of state or federal governmental action is required to support this claim. *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982). The district court properly found that evidence of the only "state action" alleged in support of this claim — the involvement of the CIA in a conspiracy with FNB and ATC — is barred by the terms of the protective order.

Count 3. In order to establish his claim for constructive abusive discharge, petitioner must show that the motivation for his alleged discharge "contravenes some clear mandate of public policy." *Adler v. American Standard Corporation*, 291 Md. 31, 47, 432 A.2d 464, 473 (1981). According to the First Amended Complaint (¶ 84), the public policies that the Bank violated are those expressed in the Arms Export Control Act, 22 U.S.C. §§ 2751-2796, the International Security and Development Cooperation Act of 1981, 22 U.S.C. §§ 2311-2312 (1990) and the Congressional Oversight Act, 50 U.S.C. § 413 (1991). Inquiry whether the ATC accounts were controlled by the CIA, as petitioner alleges, as well as inquiry regarding the purpose of the funds transfers that petitioner allegedly effected for ATC, would be necessary to reach a judgment regarding which, if any, of those laws were violated.

Count 4. In support of his claim for intentional infliction of emotional distress, petitioner relies upon allegations that he was asked to work on ATC accounts that were covert CIA accounts used to perform illegal activities, and that FNB officials made statements to the effect that the CIA was monitoring petitioner's attempts to air his concerns about the accounts and was both threatening him and requesting meetings with him. Clearly, evidence offered to support or refute those allegations would tend to confirm or deny the existence of a CIA-ATC-FNB relationship. Petitioner's allegations that he received "only" a satisfactory performance rating and a "less than average pay raise", while perhaps not requiring proof of CIA involvement, are scarcely

sufficient in themselves to establish a claim for intentional infliction of emotional distress under Maryland law. *See, e.g., Beye v. Bureau of National Affairs,* 59 Md. App. 642, 477 A.2d 1197, *cert. denied,* 301 Md. 639, 484 A.2d 274 (1984).

Count 5. Petitioner's claim for misappropriation of name is based on his allegation that FNB officials placed his name on ATC account records without his consent. According to the First Amended Complaint (¶ 92), this "caused plaintiff severe emotional distress, pain and suffering, trauma, fear of bodily injury to himself and to his family, embarrassment and personal humiliation, [and] permanent psychiatric injury . . . ." This litany of injuries makes no sense if it is merely established that the Bank put petitioner's name on an account of a customer without his consent; an assessment of petitioner's claim under Count 5 would necessarily entail inquiry into petitioner's allegations regarding CIA control of the ATC account and the nature and legality of the funds transfers effected through that account.

In sum, the alleged relationship among the CIA, ATC and FNB lies at the center of each of the petitioner's claims. Thus, virtually all of the evidence that would be presented by the petitioner in attempting to establish his claims, and by the respondents in refuting those claims, would necessarily tend in one way or another to confirm or deny the existence of that relationship. In order to give effect to the order protecting state secrets, the district court had no option but to grant the respondents' motions for summary judgment.

CONCLUSION

For these reasons, and for the reasons put forth by the United States, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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